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THE END OF LAW AS DEVELOPED IN JURISTIC THOUGHT

II

8. THE NINETEENTH CENTURY[1]

A CHARACTERISTIC juristic achievement of the nineteenth century was the setting off of jurisprudence as a separate science. This was the culmination of a development that began in the seventeenth century. Prior to that time jurisprudence and politics were treated along with theology as applications of its doctrines.[2] In a second stage jurisprudence, politics and international law were treated together. The philosophical foundation was taken to suffice for all three and the details of each subject were supposed to be reached by deduction therefrom.[3] Separation from politics was gradually achieved in the nineteenth century,[4]

[1] Continuation of the paper in 27 HARV. L. REV. 605. See also my paper, "The Philosophy of Law in America," VII ARCHIV FÜR RECHTS- UND WIRTHSCHAFTS-PHILOSOPHIE, 213, 385.

[2] See 27 HARV. L. REV. 605, 609 *et seq.* In HOBBES'S LEVIATHAN (1651) two of the four parts are theological. Compare also SPINOZA'S TRACTATUS THEOLOGICO-POLITICUS (1670).

[3] See, for example, the sequence of BURLAMAQUI, PRINCIPES DU DROIT NATUREL (1747) and PRINCIPES DU DROIT POLITIQUE (1751); the order of treatment, that is, general philosophical foundation, philosophical jurisprudence, politics, international law, in WOLFF, INSTITUTIONES IURIS NATURAE ET GENTIUM (1740–49), and the like order in RUTHERFORTH, INSTITUTES OF NATURAL LAW (1754–56).

[4] It is true the metaphysical jurists of the nineteenth century did not wholly abandon the old connection of jurisprudence, politics, legislation, and international law.

and as the three distinct methods, philosophical, analytical and historical, were definitely worked out, the English analytical school believed that they had achieved a separation of jurisprudence from philosophy and ethics and in consequence from the science of legislation.[5] The English historical school, conceiving that the traditional element in legal systems was the real law and that law was to be found in the unfolding of the principle of justice in human experience rather than made by legislators, agreed in this separation of jurisprudence and the science of legislation. Accordingly Maine said:

"Investigation of the principles on which direct improvement of substantive legal rules should be conducted belongs . . . not to the theorist on jurisprudence, but to the theorist on legislation." [6]

It has been suggested that a similar narrow tendency in nineteenth-century philosophy is to be attributed to division of labor in the universities and the requirements of academic courtesy. Very likely these played some part in the segregation of jurisprudence and the nineteenth-century Anglo-American tendency to insist upon analytical jurisprudence, where the lawyer required no aid from without and was continually in an atmosphere of pure law, as the whole of legal science.[7] But the great expansion of learning in the last century, which prevented anyone from taking more than a corner of knowledge for his province, and the general tendency of the time to lay out everything analytically, to confine it to defined limits and to reduce it to rule, a tendency which the idea of evolution

See, for example, LORIMER, INSTITUTES OF LAW, 2 ed., bk. II, ch. 1, and bk. IV, ch. 3 (1880). Compare LASSON, SYSTEM DER RECHTSPHILOSOPHIE (1882), where the philosophical foundations of public law are discussed but not politics.

[5] Thus Markby says: "What . . . Austin's predecessors do not appear to me to have fully apprehended, at least not with that sure and firm grasp which proceeds from a full conviction, is the distinction between positive law and morals. We find, for example, that Bentham, when drawing the line between jurisprudence and ethics, classes legislation under jurisprudence, whereas, as Austin has shown, it clearly belongs to ethics. Austin, by establishing the distinction between law and morals, not only laid the foundations for a science of law but cleared the conception of law and of sovereignty of a number of pernicious consequences to which in the hands of his predecessors it had been supposed to lead." ELEMENTS OF LAW, 6 ed., § 12.

[6] EARLY HISTORY OF INSTITUTIONS, 7 ed., Lect. 12, p. 345.

[7] HOLLAND, ELEMENTS OF JURISPRUDENCE, ch. 1; MAINE, EARLY HISTORY OF INSTITUTIONS, 7 ed., Lect. 12, p. 370. The latter says: "The jurist properly so called has nothing to do with any ideal standard of law or morals." Compare the more temperate statement of this view by GRAY, NATURE AND SOURCES OF THE LAW, §§ 1–9.

has not yet succeeded in driving even from the biological sciences, are also to be reckoned with. In any event this extreme division of labor had its good side, since analysis and legal history, pursued excessively for a time, have afforded results upon which a new philosophy of law may proceed with assurance. The bad side was the abdication of all juristic function in improving the law, the abandonment of juridical idealism, and the reduction of those who were best qualified to take conscious part in legal development to the position of mere observers. Coinciding with a period of maturity and stability in the law, this juristic pessimism coincided also with the dominance of the idea of *laissez faire* in economics. Thus the conception of the end of law as an unshackling of individual energy, as an insuring of the maximum of individual free self-assertion, gave rise to a conception of the function of law as a purely negative one of removing or preventing obstacles to such individual self-assertion, not a positive one of directly furthering social progress.

Five types of nineteenth-century juristic thinkers deserve consideration. They may be called (1) the metaphysical jurists, (2) the English utilitarians, (3) the historical jurists, (4) the positivists, and (5) the social-individualists.

Metaphysical jurisprudence [8] begins with Kant, who puts in its final form the conception of the end of law which came in with the Reformation. In principle the Reformation denied the authority of any doctrine the evidence of which the individual could not find in his own reason and denied the authority of any rule which could not be referred to the will of the individual to be bound. Hence the

[8] KANT, METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE, 2 ed., 1798, English translation, KANT'S PHILOSOPHY OF LAW, by Hastie, 1887 (a good exposition may be found in 2 CAIRD, THE CRITICAL PHILOSOPHY OF KANT, 293–350); FICHTE, GRUNDLAGE DES NATURRECHTS, 1798, new ed. by Medicus, 1908, English translation, FICHTE'S SCIENCE OF RIGHTS, by Kroeger, 1889; HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS, 2 ed. by Gans, 1840, new ed. by Lasson, 1911, English translation, HEGEL'S PHILOSOPHY OF RIGHT, by Dyde, 1896; KRAUSE, ABRISS DES SYSTEMES DER PHILOSOPHIE DES RECHTES, 1825; KRAUSE, SYSTEM DER RECHTSPHILOSOPHIE (posthumous), ed. by Röder, 1874; AHRENS, COURS DE DROIT NATUREL, 8 ed., 1892 (1 ed., 1837); RÖDER, GRUNDZÜGE DES NATURRECHTS, 2 ed., 1860; GREEN, PRINCIPLES OF POLITICAL OBLIGATION, reprinted from his Complete Works, 1911 (lectures delivered 1879–80); LORIMER, INSTITUTES OF LAW, 1880; LASSON, LEHRBUCH DER RECHTSPHILOSOPHIE, 1882; MILLER, LECTURES ON THE PHILOSOPHY OF LAW, 1884; BOISTEL, COURS DE PHILOSOPHIE DE DROIT, 1899; HERKLESS, LECTURES ON JURISPRUDENCE (posthumous), 1901.

elaborate arguments by which eighteenth-century jurists seek to make out that each individual has consented to the law through representatives or has willed it through a social compact.[9] In Kant this fiction of consent of the individual will is replaced by an imposition upon the individual free will through the reciprocal action of free wills whereby they may be reconciled by a universal law, which, therefore, is imposed by a necessity inherent in the very idea of freedom.[10] Thus we realize individual freedom through rules of law, and the end of law is "to keep self-conscious beings from collision with each other, to secure that each should exercise his freedom in a way that is consistent with the freedom of all others, who are equally to be regarded as ends in themselves." [11]

Kant's separation of each man from the social organism was characteristic of the eighteenth century. But this putting of the individual person at the center of juristic theory and the individual conscience at the center of ethical theory "separated him also from the past out of which his intellectual life had grown."[12] Hegel saw that it was unhistorical and took the moral organism for the central point of his ethical theory.[13] Here we have the beginning of a new point of view, which becomes significant in the social philosophical jurists at the end of the century. But nineteenth-century metaphysical jurisprudence remained thoroughly individualist. It insisted not on the proposition that freedom was the realization of the universal will but on the proposition that the end of man was freedom.[14] It developed the idea of free will into the practical consequence of civil liberty, an idea of general freedom of action for individuals. Hence the end of law was to secure to each individual the widest possible liberty. The justification of law was that there

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[9] 1 BLACKSTONE, COMMENTARIES, 140, 158–59; 1 WILSON, WORKS (Andrews' ed.), 88–89 (written 1790); WOODDESSON, ELEMENTS OF JURISPRUDENCE, xvii (1792).

[10] RECHTSLEHRE, 2 ed., xxii–xxiii. See a good exposition of this in 2 CAIRD, 296–300. Compare HERKLESS, LECTURES ON JURISPRUDENCE, 14–15.

[11] 2 CAIRD, 296.

[12] 1 CAIRD, 64.

[13] GRUNDLINIEN DER PHILOSOPHIE DES RECHTS, § 33. See WALLACE, HEGEL'S PHILOSOPHY OF MIND, 21–23; 3 ERDMANN, HISTORY OF PHILOSOPHY (Hough's transl.), 4.

[14] See 2 STIRLING, THE SECRET OF HEGEL, 551–52; CROCE, CE QUI EST VIVANT ET CE QUI EST MORT DE LA PHILOSOPHIE DE HEGEL, 114. "The history of the world is nothing but the development of the idea of freedom." HEGEL, PHILOSOPHY OF HISTORY (Sibree's transl.), pt. IV, ch. 3.

is no true liberty except where there is law to restrain the strong who interfere with the freedom of action of the weak and the organized many who interfere with the free individual self-assertion of the few.[15] The test of right and justice was the amount of liberty secured.[16] Though Anglo-American jurists paid little or no attention to the systems of the metaphysical school, its central idea of abstract individual liberty fitted into our eighteenth-century individualism so well that the school began to have some influence in the United States[17] until a new and more attractive mode of getting to the same result was furnished by the positivists.

While the metaphysical jurists were deducing the whole system of

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[15] "The value then of the institutions of civil life lies in their operation as giving reality to these capacities of will and reason, and enabling them to be really exercised. In their general effect . . . they render it possible for a man to be freely determined by the idea of a possible satisfaction of himself, instead of being driven this way and that by external forces, and thus they give reality to the capacity called will; and they enable him to realize his reason, *i.e.*, his idea of self-perfection, by acting as a member of a social organization in which each contributes to the better-being of all the rest. So far as they do in fact thus operate they are morally justified." GREEN, PRINCIPLES OF POLITICAL OBLIGATION, 32–33. *Cf.* COURCELLE-SENEUIL, PRÉPARATION À L'ÉTUDE DU DROIT, 114; PULSZKY, THEORY OF LAW AND CIVIL SOCIETY, § 170; EMERY, CONCERNING JUSTICE, 108–09. See also BENTHAM, THEORY OF LEGISLATION (transl. by Hildreth, 10 ed.), 95.

[16] 1 AHRENS, COURS DE DROIT NATUREL, 8 ed., §§ 17–18; TRENDELENBURG, NATURRECHT, § 46; LORIMER, INSTITUTES OF LAW, 2 ed., 353, 523.

"It reduces the power of coercion to *what is absolutely necessary for the harmonious co-existence of the individual with the whole.*" 1 LIOY, PHILOSOPHY OF RIGHT (transl. by Hastie), 121.

"Every rule of law in itself is an evil, for it can only have for its object the regulation of the exercise of rights, and to regulate the exercise of a right is inevitably to limit it. On the other hand every rule of law which sanctions a right, which preserves it from an infringement, which protects it from a peril is good because in this way it responds to its legitimate end. Thus if law is an evil, it is a necessary evil." BEUDANT, LE DROIT INDIVIDUEL ET L'ÉTAT, 148 (1891).

Cf. MILLER, LECTURES ON THE PHILOSOPHY OF LAW, 70–74.

[17] "This, the sole legitimate end and object of law, is never to be lost sight of — security to men in the free enjoyment and development of their capacities for happiness." SHARSWOOD, LEGAL ETHICS, 5 ed., 22.

"There is a guide which, when kept clearly and constantly in view, sufficiently informs us what we should aim to do by legislation and what should be left to other agencies. This is what I have so often insisted upon as the sole function both of law and legislation, namely, to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of the like liberty to all others. Liberty, the first of blessings, the aspiration of every human soul, is the supreme object. Every abridgment of it demands an excuse, and the only good excuse is the necessity of preserving it." CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION, 337.

rights and the idea of the end of the legal system from a metaphysical conception of free will, another school was seeking a practical principle of law-making. The metaphysical school was a school of jurists. They had their eyes upon the law as a whole, upon systems of law which had come down from the past, and they sought the principles upon which such systems and their doctrines could be based philosophically and by which rules of law might be criticized and their further development might be directed. The English utilitarians,[18] on the other hand, were a school of legislators. The metaphysical jurists employed the philosophical method in jurisprudence and did not separate the science of law and the science of legislation. The English utilitarians developed the analytical method in jurisprudence and employed the philosophical method in the science of legislation. Accordingly while the metaphysical jurists sought principles of criticism of what was, the utilitarians sought principles of constructing a new body of law by conscious law-making. Bentham's life work was law reform.[19] The practical principle which he laid down, as that which should govern legislative reform of law, was the principle of utility: Does the rule or measure conduce to human happiness? The principle of criticism which he urged was: How far does the rule or measure conduce to human happiness? This principle and this criterion might have been used to break down the individualist idea of justice as Jhering used the idea of purpose later. But at this time individualist ideas were too firmly fixed in men's minds to be questioned. For the individualist tradition of seventeenth and eighteenth-century thought was reinforced by economic reasons in the age of Adam Smith and the great British economists and by political reasons in the reaction from the age of absolute governments which made the period following the French Revolution fearful of centralized authority and jealous of local and individual independence. The

[18] BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, 1780, reprinted by the Clarendon Press, 1879; BENTHAM, TRAITÉS DE LÉGISLATION (ed. by Dumont, 1802), English translation by Hildreth, BENTHAM'S THEORY OF LEGISLATION, 10 ed. 1904; BENTHAM, PRINCIPLES OF THE CIVIL CODE, 1 WORKS, 295–364; MILL, ON LIBERTY, 1859. For the philosophical side, see ALBEE, HISTORY OF ENGLISH UTILITARIANISM; STEPHEN, THE ENGLISH UTILITARIANS. For the juristic side, see DICEY, LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY, Lect. 6; SOLARI, L'IDEA INDIVIDUALE E L'IDEA SOCIALE NEL DIRITTO PRIVATO, §§ 31–36.

[19] On Bentham's life and work reference may be made to ATKINSON, JEREMY BENTHAM.

criterion of the greatest good of the greatest number might easily be put in a way that would not be far from recent ideas of justice. Thus, that which serves for the happiness of the greatest number, used as a measure of the conduct of each, might serve as the basis of a social utilitarianism.[20] But Bentham did not question individualism. He vacillated between an idea of utility as the greatest happiness of the individual and an idea of utility as the greatest happiness of the greatest number. In truth he did not need to choose between them since he assumed that the greatest general happiness was to be procured through the greatest individual self-assertion. Hence his fundamental principle was not substantially different from that of the metaphysical jurists.[21] Negatively his program was, unshackle men; allow them to act as freely as possible. And this was the idea of the metaphysical school. Positively his program was, extend the sphere and enforce the obligation of contract. This, we shall see presently, was the idea of the historical school.

Bentham's principle, then, was: Allow the maximum of free individual action consistent with general free individual action. Thus the end of law came to the same thing with him as with the metaphysical jurists, namely, to secure the maximum of individual self-assertion. Bentham's theory of the legal order made a strong appeal to the common-law lawyer. Our Anglo-American legal system had kept much of the individualism of the strict law. The stage of equity and natural law had by no means made it over and the development of equity was not complete in England when English law was received in this country.[22] Moreover, in the classical contests between the courts and the crown in the seventeenth century the common law had been made to stand between the individual and oppressive state-action. Thus the common-law tradition was thoroughly individualist, and this tradition was especially congenial to the Puritan, who was dominant in America down to the time of the Civil War.[23] However much the practising

[20] *Cf.* TANON, L'ÉVOLUTION DU DROIT ET LA CONSCIENCE SOCIALE, 3 ed., 185–89.

[21] Dicey has formulated it thus: "Every person is in the main and as a general rule the best judge of his own happiness. Hence legislation should aim at a removal of all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbors." LAW AND PUBLIC OPINION IN ENGLAND, 2 ed., 146.

[22] See Pound, "The Place of Judge Story in the Making of American Law," 48 AM. L. REV. 676.

[23] See Pound, "Puritanism and the Common Law," 45 AM. L. REV. 811. To be

lawyer might affect to despise philosophical theories of law, he could but be content with a theory that put plausible reasons behind his traditional habits of thought. The one difficulty was the English utilitarian's fondness for legislative lawmaking, which was out of accord with the common-law tradition. But this difficulty presently disappeared.

It is a curious circumstance that while Bentham and Austin believed in legislation and hoped for an ultimate codification, the interpretation of utility as requiring a minimum of interference with the individual led the next generation of English utilitarians to the same position as that of the historical school, namely, that except in a few necessary cases legislation is an evil. The historical school held it an evil because it sought to do what could not be done. The neo-utilitarians held it an evil because that government was best that governed least and left men freest to work out their own destiny. Bentham had already put security as the main end to which the legal order should be directed.[24] A utilitarian version of the nineteenth-century juristic pessimism was deduced from this idea. We could not achieve any positive good by law; we could only avert some evils.[25]

Thus the English utilitarians did not contribute much of moment to the theory of the end of the legal order. They merely strengthened in the minds of lawyers the extreme individualism which the latter had inherited with the common-law tradition. Perhaps their most significant achievement was in definitely driving the eighteenth-

complete, one should add the influence of the pioneer in nineteenth-century America. See Pound, "The Administration of Justice in the Modern City," 26 HARV. L. REV. 302.

[24] THEORY OF LEGISLATION, PRINCIPLES OF THE CIVIL CODE, pt. I, ch. 7. *Cf.* SHARSWOOD, LEGAL ETHICS, 5 ed., 22.

[25] "The value of law is to be measured not by the happiness which it procures but by the misery from which it preserves us." MARKBY, ELEMENTS OF LAW, 6 ed., § 58. "We shall, therefore, look for happiness in the wrong direction if we expect it to be conferred upon us by the law. Moreover, not only is it impossible for the law to increase the stock of happiness: it is just as impossible for the law to secure an equal distribution of it. Equality may be hindered by the law, it cannot be promoted by it." *Id.*, § 59.

"What is the true province of legislation, ought to be better understood. It is worth while to remark, that in every new and amended state constitution, the Bill of Rights spreads over a larger space; new as well as more stringent restrictions are placed upon legislation. There is no danger of this being carried too far: as Chancellor Kent appears to have apprehended that it might be. There is not much danger of erring upon the side of too little law." SHARSWOOD, LEGAL ETHICS, 5 ed., 22–23.

century natural law out of the English books. For example, in discussing condemnation of private property, Blackstone said that the public was "in nothing so essentially interested as in securing to every individual his private rights." [26] This is the natural-rights idea of the eighteenth century. A little more than a century later Sir George Jessel said:

"If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts . . . shall be enforced by courts of justice." [27]

Here we have Bentham's program of unshackling men and extending the sphere of contract. But we have also the individual free-will idea, the individual-liberty idea of the metaphysical jurists. It is worth while to reflect that these words were written in a case involving a contract as to the use of a patent. Not only do we limit the freedom of contract of whole classes of men of full age and competent understanding at every turn in modern labor legislation, but we are not so sure today that whatever contract as to use of his patent a patentee may choose to make is to be upheld at all events.[28]

The historical jurists [29] were more concerned with the nature of law and the content of legal systems than with the end of law. They took their philosophical ideas from the metaphysical school and so agreed in holding individual liberty to be the fundamental idea.[30] This was facilitated by, or perhaps rather it resulted in, their adopting the political interpretation of legal history. For they conceived

[26] 1 COMMENTARIES, 139.

[27] Printing Co. *v.* Sampson, 19 Eq. 462, 465 (1875).

[28] Bauer *v.* O'Donnell, 229 U. S. 1 (1912). See Montague, "The Proposed Patent Law Revision," 26 HARV. L. REV. 128; Abbot, "Patents and the Sherman Act," 12 COL. L. REV. 709.

[29] MAINE, ANCIENT LAW, 1861, new ed. by Pollock, 1906; MAINE, EARLY HISTORY OF INSTITUTIONS, 1874; MAINE, EARLY LAW AND CUSTOM, 1883; MAINE, VILLAGE COMMUNITIES IN THE EAST AND WEST, 1871; PULSZKY, THEORY OF LAW AND CIVIL SOCIETY, 1888; CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION, 1907; PUCHTA, CURSUS DER INSTITUTIONEN, §§ 1–3 (1841); ARNDTS, JURISTISCHE ENCYKLOPÄDIE UND METHODOLOGIE, § 12 (1860); 1 WÄCHTER, PANDEKTEN, § 1 (1880).

[30] "Freedom is the foundation of right, which is the essential principle of all law." PUCHTA, INSTITUTIONEN, § 2 (Hastie's transl.). "In virtue of freedom man is the subject of right and law. His freedom is the foundation of right and all real relations of right and law flow from it." *Id.*, § 4. "Law is consequently the recognition of that jural freedom which is externalized and exhibited in persons and their acts of will and their influence upon objects." *Id.*, § 6.

that the history of law was a history of the gradual acquisition or recognition of individual liberty. This is the central philosophical idea in the writings of Sir Henry Maine.[31] As has been pointed out elsewhere, Maine's doctrine of the progress from status to contract is a political type of idealistic interpretation.[32] For a purely ethical idea of right it substitutes a political idea of individual freedom. It sees in law and in legal history a manifestation and development of this idea. Hence it finds the end of all law in liberty, conceived in the sense of the widest possible individual self-assertion. It teaches that a movement from individual subjection to individual freedom, from status to contract, is the key to social and legal development. It conceives of social progress as an unfolding of the idea of individual liberty by relieving the individual from the constraint of social institutions. It conceives of political progress as a like unfolding of the idea of liberty; as a gradual limitation and direction of state action so as to make possible the maximum of individual self-assertion which is taken to be the maximum realization of the idea of liberty. It conceives of jural progress as a progress from institutions where rights, duties and liabilities are annexed to status or relation to institutions where rights, duties and liabilities flow from voluntary action and are consequences of exertion of the human will.

Maine's teaching was so completely in accord with the individualism which characterized the traditional element of our law for other reasons and accorded so well with the absolute ideas which our law books had inherited from the eighteenth century that it soon got entire possession of the field. Much in American judicial decision with respect to master and servant, liberty of contract and right to pursue a lawful calling, which it has been the fashion of late to refer to class bias of judges or to purely economic influences,[33] is in real-

[31] "The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which . . . seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the law of persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status . . . to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from status to contract*." ANCIENT LAW, ch. 5 *ad fin.*

[32] See my paper, "The Scope and Purpose of Sociological Jurisprudence," 25 HARV. L. REV. 140, 164.

[33] *E. g.*, SMITH, SPIRIT OF AMERICAN GOVERNMENT, ch. 5; ROE, OUR JUDICIAL

ity merely the logical development of traditional principles of the common law by men who, if they had not been so taught, read every day in their scientific law books of the progress from status to contract and the development of law through securing and giving effect to the human will. But in truth, so far as developed systems of law are concerned, Maine's famous generalization is drawn from the Roman law only. The main characteristics of status are that it is a condition which can not be divested voluntarily, and that rights, duties and liabilities flow from or are annexed to this condition of a person rather than his volition. In the maturity of Roman law, in contrast, the theory of natural law had put an end to most of these conditions directly or indirectly, and the law sought to secure the will of the individual against aggression and to give effect to the will to create legal consequences wherever possible. Hence, if we use contract to mean legal transaction, there was in Roman law a progress from status to contract. There was a progress from a situation where legal institutions paid no regard to volition to one where volition was chiefly regarded.

It is by no means so clear that the generalization may be maintained when applied to Anglo-American law. For a fundamental difference between the Roman system and our own system is involved. In the Romanist system the chief rôle is played by the conception of a legal transaction, an act intended to create legal results to which the law, carrying out the will of the actor, gives the intended effect. The central idea in the developed Roman law, shaped by philosophical theories, is to secure and effectuate the will.[34] All things are deduced from or referred to the will of the actor. Arising as the law of the city of Rome when it was a city of

OLIGARCHY, ch. 5; MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, ch. 16.

[34] 1 WINDSCHEID, PANDEKTEN, §§ 37, 47, 69; 1 JHERING, GEIST DES RÖMISCHEN RECHTS, § 10; 3 VOIGT, DAS IUS NATURALE, AEQUUM ET BONUM UND IUS GENTIUM DER RÖMER, §§ 17 *ff*.

"The department of law where the peculiar genius of the Roman jurists found full scope is the law of obligations . . . ; and here again it is more especially the law relating to those contracts where not merely the expressed but also the unexpressed intention of the parties has to be taken into account (the so-called *negotia bonae fidei*). And in regard to this unexpressed intention which is not, for the greater part, present to the mind of the party himself at the moment of concluding the contract, it was the Roman jurists who discovered it, and discovered it for all times to come, and enunciated the laws which result from its existence." SOHM, INSTITUTES OF ROMAN LAW (Ledlie's transl.), § 15.

patriarchal households, and as a body of rules for keeping the peace among the heads of these households, its problem was to reconcile the conflicting activities of free men, supreme within their households but meeting and dealing with their equals without. Accordingly it held them in penalties for such injuries as they did wilfully, and held them in obligations to such duties or performances as they undertook in legal form. It held them for what they willed and did willingly, and it held them to what they willed and undertook legally. In our law, by contrast, the central idea is rather relation. Thus, in case of agency the civilian thinks of an act, a manifestation of the will, whereby one person confers a power of representation upon another and of a legal giving effect to the will of him who confers it. Accordingly he talks of a contract of mandate [35] or of a legal transaction of substitution.[36] The common-law lawyer, on the other hand, thinks of the relation of principal and agent and of powers, rights, duties and liabilities, not as willed by the parties, but as incident to and involved in the relation. He, therefore, speaks of the relation of principal and agent. So in partnership. The Romanist speaks of the contract of *societas*. He develops all his doctrines from the will of the parties who engaged in the legal transaction of forming the partnership.[37] We speak, instead, of the partnership relation and of the powers and rights and duties which the law attaches to that relation. Again, the Romanist speaks of a letting and hiring of land and of the consequences which are willed by entering into that contract.[38] We speak of the law of landlord and tenant and of the warranties which that relation implies, the duties it involves, and the incidents attached thereto. The Romanist speaks of a *locatio operarum*, a letting of services and of the effects

[35] 2 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 10 ed., §§ 1191–94; 2 CHIRONI, ISTITUZIONI DI DIRITTO CIVILE ITALIANO, 2 ed., § 344.

[36] See, however, the critique of this conception in SCHLOSSMANN, LEHRE VON DER STELLVERTRETUNG, §§ 3, 4, 80. Accordingly the Romanist does not know our doctrine of undisclosed agency. BARON, PANDEKTEN, § 65, II. On his theory, necessarily, if agency is disclosed, a contract with the principal is willed; otherwise not. The common law looks rather to the actual existence of the relation of principal and agent.

[37] 2 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 10 ed., §§ 1014–15. This refers only to "civil partnerships." The "commercial partnership," the creature not of the Roman law but of the law merchant, is treated as a juristic person. *Id.*, § 1021. See also 2 CHIRONI, ISTITUZIONI DI DIRITTO CIVILE ITALIANO, 2 ed., §§ 340, 341.

[38] 2 WINDSCHEID, PANDEKTEN, §§ 399–400; 2 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 10 ed., §§ 898–903.

which the parties have willed thereby. We speak of the relation of master and servant and of the duty to furnish safe appliances and the assumption of risk which are imposed upon the respective parties thereto. The Romanist speaks of family law. We speak of the law of domestic relations.[39] The double titles of our digests, such as principal and surety, or vendor and purchaser, where the Romanist would use the one word, suretyship or sale, tell the same story.

The idea of relation, and of legal consequences flowing therefrom, pervades every part of Anglo-American law. At law the original type which provided the analogy still persists in the law of landlord and tenant. If one occupies another's land adversely the latter may put him out and may then have his action for mesne profits. But he has no action against the wrongful occupier on the ground that he is enriched unjustly by use and occupation of the land.[40] The action for use and occupation may only be maintained where a relation exists. When the relation does exist, however, a train of legal consequences follows. There is an implied warranty of quiet enjoyment. There is an obligation to pay rent simply because of the relation, which the covenants in the lease only liquidate.[41] Covenants in the lease run with the land; that is, the incidents so created go with the land, not with the person who made them. Again, in case of a conveyance for life there is still the relation of tenure, involving duties of the tenant toward those in reversion and remainder. Hence covenants are said to run with the land, that is, to follow the relation. But in case of a conveyance in fee simple there has been no relation since the statute of *Quia Emptores* in the reign of Edward I, and so the burden of covenants in the conveyance did not run. In the United States, when we first sought to extend the law as to

[39] If it be said that this is a relatively recent phrase in our books, it may be pointed out that the title "baron and feme" goes a long way back and, as contrasted with "law of persons," has the true common law ring.

[40] As to this anomalous doctrine and the historical reasons therefor, see KEENER, QUASI-CONTRACTS, 191–92.

[41] Hence the rent follows the reversion, but the assignee of the reversion cannot recover of the covenantor, who agreed to pay, but only of the assignee of the term. Walker's Case, 3 Rep. 22 *a* (1588); Humble *v.* Glover, Cro. Eliz. 328 (1595). Hence also, notwithstanding the covenant to pay rent, if the lessor was not seised at the time of the lease so that no relation was created, there is a legal defense to the covenant. LITTLETON, § 58. Coke explains this as a case of failure of consideration. Co. LIT., 47 *b*. But it is significant that here, and here only, the failure of consideration might be shown at law against a deed, and that the tenant was not compelled to resort to chancery.

the creation of legal servitudes by permitting such covenants to run, we did not break over the rule expressly, but our courts instead turned for a time to the word "privity," which in its proper use refers to a relation,[42] and thought the result justified by the conjuring up of a fictitious privity.[43] So also in the law of torts the existence of some special relation, to which the law may annex a duty, is often decisive of liability. One may have no duty toward a licensee other than not to injure him wantonly. But gratuitous assumption of the relation of passenger and carrier, although no more than a license to ride in the carrier's wagon, involves liability for ordinary care.[44] Again, if A is drowning and B is sitting upon the bank with a rope and life belt at hand, unless there is some relation between A and B other than that they are both human beings, for all that the law prescribes, B may smoke his cigarette and see A drown.[45] In the absence of a relation that calls for action the duty to be the good Samaritan is moral only. The recent decisions that challenge this doctrine, it is significant to observe, are in cases involving the relation of master and servant.[46] Throughout the law of negligence the common-law judge instinctively tends to seek for some relation between the parties or, as he is likely to put it, some duty of the one to the other.[47]

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[42] See the classification of privity and the examples in Co. LIT., 271 *a*.

[43] Morse *v.* Aldrich, 19 Pick. (Mass.) 449 (1837).

[44] Harris *v.* Perry, [1903] 2 K. B. 219, 225.

[45] Allen *v.* Hixson, 111 Ga. 460, 36 S. E. 810 (1900); Union Ry. Co. *v.* Cappier, 66 Kan. 649, 72 Pac. 281 (1903); Griswold *v.* Boston R. Co., 183 Mass. 434, 67 N. E. 354 (1903); Stager *v.* Laundry Co., 38 Ore. 480, 489, 63 Pac. 645 (1901); Ollett *v.* Railway Co., 201 Pa. St. 361, 50 Atl. 1011 (1902); King *v.* Interstate R. Co., 23 R. I. 583, 51 Atl. 301 (1902).

[46] Ohio, etc. Ry. Co. *v.* Early, 141 Ind. 73, 40 N. E. 257 (1894); Raasch *v.* Laundry Co., 98 Minn. 357, 108 N. W. 477 (1906); Hunicke *v.* Quarry Co., 262 Mo. 560, 172 S. W. 43 (1914); Layne *v.* Chicago, etc. R. Co., 175 Mo. App. 34, 157 S. W. 850 (1913); Salter *v.* Telephone Co., 79 Neb. 373, 112 N. W. 600 (1907). This has always been recognized in the case of seamen. The Iroquois, 194 U. S. 240 (1903); Scarff *v.* Metcalf, 107 N. Y. 211, 13 N. E. 796 (1887). In Depue *v.* Flatau, 100 Minn. 299, 111 N. W. 1 (1907), where there was no such relation, it might be urged that defendants were culpable in their affirmative acts. But the court relies on the relation between the parties created by an invitation.

[47] *Cf.* the well-known statement of Brett, M. R., in Heaven *v.* Pender, 11 Q. B. D. 503, 507 (1883): "The questions which we have to solve in this case are — what is the proper definition of the relation between two persons other than the relation established by contract, or fraud, which imposes on one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property. . . . When two drivers or two ships are approaching each other, such a relation arises between them

Again, in the case of mortgagor and mortgagee we do not ask what the parties agreed, but we apply rules, such as once a mortgage always a mortgage, or such as the rule against clogging the equity of redemption, which defeat intent, in order to enforce the incidents which courts of equity hold involved in the relation. In the case of sale of land it is not our mode of thought to consider that we are carrying out the will of the parties as manifested in their contract. Once the relation of vendor and purchaser is established, we think rather of the rights and duties involved in that relation, of the conversion of the contract right into an equitable ownership, and the turning of the legal title of the vendor into a security for money, not because the parties have so intended, but because the law, sometimes in the face of stipulations for a forfeiture, gives those effects to their relation.[48] Then, too, we have the great category of fiduciary relations, of which trustee and beneficiary is the type. It is true

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when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because any one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill under such circumstances there would be such danger. . . . In the case of a railway company carrying a passenger with whom it has not entered into the contract of carriage the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. With regard to the condition in which an owner or occupier leaves his house or property, other phraseology has been used, which it is necessary to consider. If a man opens his shop or warehouse to customers it is said that he invites them to enter, and that this invitation raises the relation between them which imposes on the inviter the duty of using reasonable care so to keep his house or warehouse that it may not endanger the person or property of the person invited. This is in a sense an accurate phrase, and as applied to the circumstances a sufficiently accurate phrase. Yet it is not accurate if the word 'invitation' be used in its ordinary sense. By opening a shop you do not really invite, you do not ask A. B. to come in to buy; you intimate to him that if it pleases him to come in he will find things which you are willing to sell. So, in the case of shop, warehouse, road, or premises, the phrase has been used that if you permit a person to enter them you impose on yourself a duty not to lay a trap for him. This, again, is in a sense a true statement of the duty arising from the relation constituted by the permission to enter. It is not a statement of what causes the relation which raises the duty. What causes the relation is the permission to enter and the entry."

See also Cardozo, J., in MacPherson *v.* Buick Motor Co., 217 N. Y. 382 (1916).

[48] Setson *v.* Slade, 7 Ves. Jr. 264, 274 (1802); Champion *v.* Brown, 6 Johns. Ch. 398 (1822); *In re* Dagenham Dock Co., 8 Ch. App. 1022 (1873); Cornwall *v.* Henson, [1900] 2 Ch. 298, 304; Kilmer *v.* British Columbia Orchard Lands, Ltd., [1913] A. C. 319; Cheney *v.* Libby, 134 U. S. 68 (1889).

this category and many of the instances above recounted are the work not of common-law courts but of the courts of equity. But the common-law lawyer was at work in the courts of equity. The clerical chancellors brought about an infusion of morals into the legal system. To prevent dishonest or unconscientious conduct, interposing in part, perhaps, for the welfare of his soul, they forbade the trustee or the fiduciary doing this or that which legally he was at liberty to do. Presently the lawyers came to sit upon the woolsack. They turned at once to their staple analogy, lord and man, landlord and tenant, and out of the pious interference of the chancellors on general grounds of morals, they built the category of fiduciary relations with rights and duties annexed to them and involved in them, no matter what the parties to them may intend. So completely has this idea taken possession of equity that more than one subject, as, for example, interpleader and bills of peace, is embarrassed by a struggle to find "privity" — a struggle to find some relation to which the right to relief may be annexed.[49]

Our public law, too, is built around this same idea of relation. Magna Charta is recognized as the foundation of Anglo-American public law. But Professor Adams has shown that, as a legal document, Magna Charta is a formulation of the duties involved in the jural relation of the king to his tenants in chief.[50] As the Middle Ages confused sovereignty and property, it was easy enough to draw an instrument declaring the duties incident to the relation of lord and man which, when the former happened to be king, could be made later to serve as defining the duties owing by the king in the relation of king and subject. Political theory sought to explain the duties of rulers and governments by a Romanist juristic theory of contract, a theory of a contract between sovereign and subjects which was devised originally in the contests between church and state to justify the disobedience of the pious subject who resisted a royal contemner of ecclesiastical privileges. We have seen in another connection how the two theories merged in the eighteenth century and the common-law rights of Englishmen, involved in the relation of king and subject, became the natural rights of man deduced from

[49] 2 STORY, EQUITY JURISPRUDENCE, § 120; 4 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1324; Dilly *v.* Doig, 2 Ves. Jr. 486 (1794); Tribette *v.* Illinois R. Co., 70 Miss. 182, 12 So. 32 (1892). The requirement of privity in interpleader is criticised both by Story and Pomeroy.

[50] ORIGIN OF THE ENGLISH CONSTITUTION, chs. 4, 5.

a social compact. Here it suffices to note that the latter is an alien conception in our law. After working no little mischief in our constitutional law in the nineteenth century, this idea of natural rights resting upon a social compact and merely declared by constitutions is giving way, and there are signs that we shall return to the true common-law conception of a statement of the rights and duties which the law imposes on or annexes to the relation of ruler and ruled.[51]

Because of its origin in the general application to new problems of the analogy of the reciprocal rights and duties of lord and man, I have ventured to call this element of our legal tradition "feudal law." [52] Perhaps it should be called the Germanic element. For in comparing Roman law and Germanic law we are struck at once by differences of treatment of the same institution in the two systems, and these differences turn largely upon their respective use of will and of relation as fundamental notions. Compare, for instance, the Roman *patria potestas*, the power of the head of the household, with the corresponding Germanic institution of the *mundium*. The Roman institution is legally quite one-sided. The *paterfamilias* is legally supreme within the household. He has rights. But whatever duties he may owe are owed without the household, not within.[53] On the other hand the Germanic institution is conceived of as a relation of protection and subjection. But the subjection is not because of a right of the house-father. It is a subjection because of the relation and for the purposes of the protection which the relation involves. Also the right of the house-father grows out of the relation and is a right against the world to exercise his duty of protection.[54] Indeed there is some warrant for the view that Tacitus indicates this idea of relation as a characteristic Germanic institution.[55] At any rate it became the fundamental legal idea in the feudal social organization. Accordingly in Anglo-American law it is a generalization from the results of judicial working out of one problem after

[51] See the observations of Winslow, C. J., in Borgnis *v.* Falk Co., 147 Wis. 327, 348–50, 133 N. W. 209 (1911).

[52] Pound, "A Feudal Principle in Modern Law," 15 INT. J. OF ETHICS, 1, 20.

[53] MOS. ET ROM. LEG. COLL. IV, 8; GAIUS, I, §§ 117–18, II, § 87, IV, § 75; PAULUS, SENTENTIAE, V, 1, § 1; DIG. XLIV, 7, 9; COD. VIII, 46, 10.

[54] 1 HEUSLER, INSTITUTIONEN DES DEUTSCHEN PRIVATRECHTS, §§ 20, 23, 24.

[55] GERMANIA, caps. XIII, XIV, XXV. See SCHRÖDER, LEHRBUCH DER DEUTSCHEN RECHTSGESCHICHTE, 4 ed., 32–35.

another by the analogy of the institution with which courts were most familiar and had most to do in the formative period of English law, namely, the relation of lord and tenant.

In the nineteenth century the feudal contribution to the common law was in disfavor. Jurists thought of individuals and contracts rather than of groups and relations. The conception of the abstract individual ruled in legal philosophy. The medieval guilds were gone and the legal position of trade unions and a legal theory of collective bargaining had not yet become problems for the lawyer. Hence the nineteenth-century lawyer thought ill of anything that had the look of the archaic institution of *status*. The Romanist idea of contract became the popular juristic instrument, and attempt was made to Romanize more than one department of Anglo-American law by taking for the central idea the Roman doctrine of a legal giving effect to the individual will.[56] This tendency was in part the result of the confident attempt of the age of enlightenment to explain all things by the light of unaided reason, and so is to be classed with the tendency to invent apocryphal reasons for legal doctrines instead of criticizing them, which marks the decadence of the philosophical method in the last century. But after the historical school had turned the light of history upon legal institutions they kept for some time the color given them by the eighteenth-century light of reason. System in the common law was but beginning. Of necessity those who sought for systematic ideas turned to the Continental treatises on Roman law. The resulting tendency to Roman-

[56] "The law of contracts in its widest extent may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts express or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of human life implies, or, rather, is, the continual fulfilment of contracts." 1 PARSONS, CONTRACTS *3 (1853). Compare also the tendency to Romanize the law of bailments on "the hasty assumption" that the principles of the modern Roman law were universal, referred to by Mr. Justice Holmes, COMMON LAW, Lect. 5.

Another example may be seen in the law of carriers. The nineteenth century books derived this branch of the law from the law of bailment, thinking of the duties of the carrier as "implied terms" of the contract, in Roman fashion. In many law schools even now "Bailments and Carriers" is the title of a course. But this contract-theory of the carrier's obligation has thoroughly broken down. To-day we speak rather of the law of public service and derive the carrier's duties from the general obligations of a public calling in one type of which he is engaged.

As to partnership, see PARSONS, PRINCIPLES OF PARTNERSHIP, §§ 1, 3; Pepper, "What Constitutes a Partnership," 46 AM. L. REG. 137, 142.

ize the theory of Anglo-American law was furthered both in England and in the United States by the general acceptance of Maine's theory of legal progress. But Maine's generalization as it is commonly understood shows only the course of evolution of Roman law.[57] It has no basis in Anglo-American legal history, and the whole course of English and American law today is belying it unless, indeed, we are progressing backward.[58] If it be said that statutes restricting freedom of contract between employer and employee are a legislative phenomenon, and out of the right line of growth of the common law, one may point to the law of public-service companies or to the law of insurance or to the law of surety companies. In each case, and these are relatively recent judicial developments in our law, the common-law idea of relation and of the rights, duties and liabilities involved therein, has prevailed at the expense of the idea of contract.[59] It is significant that progress in our law of public-service companies has taken the form of abandonment of nineteenth-century conceptions for doctrines which may be found in the Year Books.[60]

Even more significant is the legislative development whereby duties and liabilities are imposed on the employer in the relation of employer and employee, not because he has so willed, not because he is at fault, but because the nature of the relation is deemed to call for it. Such is the settled tendency of the present, and it is but a return to the common-law conception of the relation of master and

[57] Perhaps the current view of Maine's doctrine is not wholly just to its author. He expressly limits the meaning of status so as to exclude relations arising from contract. See note 31, *ante*. But the two last paragraphs of chapter 5 of Ancient Law seem fairly to justify the usual interpretation of his theory.

[58] Note the difficulties which Miller felt as early as 1884 in attempting to square with this theory legislation which "has apparently reversed the natural order of the growth of legal forms." It must be explained, he says, "on the ground that the persons legislated for are so weak and helpless that they cannot realize their true freedom, or maintain it against others who are so strong or so unjust as to encroach on their rights. One of the first results of a consciousness of freedom will be a demand for the repeal of statutes which restrain this power of self-legislation — a demand for freedom of contract." LECTURES ON THE PHILOSOPHY OF LAW, 73. A generation has passed without any abatement in restrictions upon freedom of contract in the relation of master and servant or any sign of the reaction so confidently predicted.

[59] See Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 HARV. L. REV. 195, 225.

[60] WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 1–14, 20, 27, 34–42. *Cf.* HOLMES, COMMON LAW, Lect. 5. But see Adler, "Business Jurisprudence," 28 HARV. L. REV. 135, 147 *ff.*

servant with reciprocal rights and duties and with liabilities imposed in view of the exigencies of the relation. These statutes have put jurists to much trouble when they have sought to find a place for them in the legal system. Some have said that modern labor legislation creates a *status* of being a laborer, and this has frightened more than one court. For *status* is felt to be an archaic legal institution which we have outgrown. Hence courts have felt bound to inquire what warrant could be found for imposing disabilities upon one whom nature had given a sound mind, disposing judgment and years of discretion.[61] Others have said that the duties and liabilities involved in workmen's compensation were quasi-contractual, which means only that the author did not know what to call them or where to place them.[62] What is clear is that they are not contractual and that they do not accord with the modern principles of the law of torts. Is there, then, an irreconcilable opposition between this legislation and the modern law of torts, so that one or the other must give way? If so, and if we are to adhere to Maine's generalization as furnishing a guide to legal progress, it may go hard with this legislation in the judicial working out of its consequences.[63] But a sounder view of history, taking account of the history of our own law, will show that the common law has a place for it and that it is perfectly possible, without disturbance of our legal system, to administer these statutes and to give them the sympathetic judicial development which all statutes require in order to be effective. For it is not out of line with the common law to deal with causes where the relation of master and servant exists differently from causes where there is no such relation. It is not out of line to deal with such causes by determining the duties and the liabilities which shall flow from the relation. On the contrary, the nineteenth century was out of line with the common law when it sought to treat the relation of master and servant in any other way. In administering these acts the common law may employ its oldest and most fertile legal conception.

Much of the nineteenth-century criticism of the common law as "feudal" wholly misses the point. Austin grafted a Romanist

[61] State *v.* Haun, 61 Kan. 146, 161, 59 Pac. 340 (1899); State *v.* Loomis, 115 Mo. 307, 315, 22 S. W. 350 (1893).

[62] SALMOND, TORTS, 4 ed., 113. Compare POLLOCK, TORTS, 9 ed., 110.

[63] See Smith, "Sequel to Workmen's Compensation Acts," 27 HARV. L. REV. 235, 344.

analysis, learned in Germany, upon the political ideas of Hobbes and the ethical ideas of Bentham. Maine's interpretation of legal history was derived from the phenomena of Roman law considered from the standpoint of Savigny. Thus both of the schools of Anglo-American jurists were Romanized. The Romanist idea of a legal transaction, which the nineteenth century sought to apply to all possible situations, was regarded as the institution of the maturity of law. But the conception of the legal transaction regards individuals only. In the pioneer agricultural societies of nineteenth-century America such a conception sufficed. In the industrial and urban society of today classes and groups and relations must be taken account of no less than individuals. Happily the nineteenth century did not wholly lose for us the contribution of the feudal law to our legal tradition. If we cast aside the Romanist prejudices of the nineteenth-century historical school, we may perceive that in the idea of relation, in the characteristic common-law mode of treating legal problems which we derived from the analogy of the incidents of feudal tenure, we have an institution of capital importance for the law of the future, a means of making our received legal tradition a living force for justice in the society of today and of tomorrow.

In truth the nineteenth-century historical school was not historical. It was metaphysical. The reconciliation of the historical with the metaphysical, which was current at the end of the century, may be found in Hegel.[64] Each was heir to the law-of-nature theories of the eighteenth century. Each sought a universal, unchangeable fundamental principle. One studied the unfolding thereof in human experience as manifested in legal institutions and legal doctrines. The other verified the same process *a priori* and unfolded the principle logically. Hence the juristic pessimism of the metaphysical school was fully shared by the historical school.[65]

[64] "I maintain that the sequence in the systems of philosophy in history is similar to the sequence in the logical deduction of the notion-determinations in the idea. I maintain that if the fundamental conceptions of the systems appearing in the history of philosophy be entirely divested of what regards their outward form . . . the various stages in the determination of the idea are found in their logical notion. Conversely in the logical progression taken for itself there is, so far as its principal elements are concerned, the progression of historical manifestations. . . . This succession undoubtedly separates itself, on the one hand, into the sequence in time of history, and on the other, into succession in the order of ideas." 1 HEGEL, HISTORY OF PHILOSOPHY (transl. by Haldane), 30.

[65] "It was in no attitude of investigation and reflection . . . that the Hegelian

Somewhat later the doctrines as to the end of law which had become fixed in Anglo-American juristic thought under the influence of the historical school were reinforced in America by the influence of the positivists.[66] Spencer's writings had great vogue in America and many cases where judicial opinions show the effect of his ideas might be cited. The earlier positivists thought of the universe as governed by mathematical mechanical laws, and hence of moral and social phenomena as referable to such laws also. The next generation of positivists, influenced by Darwin, thought of evolution as governed by some such mechanical laws. Accordingly the purpose of the positivist jurists was to find laws of morals, laws of social evolution and laws of jural development analogous to gravitation, conservation of energy and the like.[67] These laws were to be found by observation and experience. But observation and experience led them to the same result to which metaphysics had led the nineteenth-century philosophical jurists and history had led the historical jurists.[68] For one thing, they got their data from the

philosophy even wished to derive the world from its single principle; it only proposed to look on and see how the development followed from the inherent impulse of the idea." LOTZE, LOGIC, § 150 (English transl., p. 196).

"[The historical school] had clipped its wings and as it were disarmed itself in declaring that scientifically it could exert no effect upon the phenomenal development of law; it had only to await, to register, to verify." Saleilles, "L'École historique et droit naturel," 1 RÉVUE TRIMESTRIELLE DE DROIT CIVIL, 94.

[66] SPENCER, PRINCIPLES OF SOCIOLOGY, Part 2, The Inductions of Sociology (1876); SPENCER, JUSTICE (1891); ARDIGO, LA MORALE DEI POSITIVISTI (1879); GUMPLOWICZ, GRUNDRISS DER SOZIOLOGIE (1885); GUMPLOWICZ, SOZIOLOGIE UND POLITIK (1892); VANNI, LEZIONI DI FILOSOFIA DEL DIRITTO (1901–02, 3 ed., 1908); LÉVY-BRÜHL, LA MORALE ET LA SCIENCE DES MOEURS (1903).

[67] "I always conceive of sovereignty in the abstract as the resultant of several conflicting forces moving in a curve. If law were the will of the strongest, it would be logical and direct. Law is not the will of the strongest, for the will of the strongest is always deflected somewhat from its proper path by resistance. Sovereignty, therefore, is a compromise, as the earth's orbit is a compromise." Brooks Adams, in CENTRALIZATION AND THE LAW, 52.

[68] "Hence that which we have to express in a precise way is the liberty of each limited only by the like liberties of all. This we do by saying: — Every man is free to do that which he wills provided he infringes not the equal freedom of any other man." SPENCER, JUSTICE, § 27. "They urge that, as throughout civilization the manifest tendency has been continually to extend the liberties of the subject and restrict the functions of the state, there is reason to believe that the ultimate political condition must be one in which personal freedom is the greatest possible; that, namely, in which the freedom of each has no limit but the like freedom of all; while the sole governmental duty is the maintenance of this limit." SPENCER, FIRST PRINCIPLES, § 2. Compare SPENCER, SOCIAL STATICS, ch. VI, § 1. "Governments are being remanded, if

historical jurists, and so looked at them not independently but through the spectacles of that school.[69] Spencer's formula of justice is a Kantian formula. He had never read Kant.[70] But Kant had become part of the thought of the time so thoroughly that each of the significant nineteenth-century schools — the metaphysical school, the English utilitarians and the positivists — came to his position as to the end of law, though for different reasons and in different ways.[71] Moreover the juristic pessimism of the other schools was fully shared by the positivists.[72]

Juristic radicalism in the nineteenth century took two paths. On the one hand the idea of justice as the maximum of individual self-assertion and the prevailing juristic pessimism led some to develop to its extreme logical consequences the doctrine that law is intrinsically evil in that it restrains liberty.[73] Hence they advocated

not into the rubbish heap of the world's back yard, yet into a secondary and subordinate place. And whereas men have relied in the past on the sovereign and the statute book for order, safety, prosperity, happiness, they are now fast coming to rely for them simply on themselves." Kimball, "Morals in Politics," in BROOKLYN ETHICAL SOCIETY, MAN AND THE STATE, 521–22 (1892). The last statement should be compared with Green (note 15, *supra*), Carter (note 17, *supra*), the utilitarian view as stated by Dicey (note 21, *supra*) and by Markby (note 25, *supra*), Sharswood (note 25, *supra*), and Miller (note 58, *supra*). Purporting to be based purely on induction, it exhibits a curious blindness to the legal and political facts of the time.

[69] Maine's Ancient Law is the principal juristic authority used in Spencer's Justice. See the table of references (American ed., p. 287 *ff.*). It is hardly a mere coincidence that the idea of the function of law in maintaining the limits within which the freedom of each is to find the widest possible development (SPENCER, FIRST PRINCIPLES, § 2, quoted in note 68, *supra*) so closely resembles Savigny's formula: "If free beings are to coexist . . . invisible boundaries must be recognized within which the existence and activity of each individual gains a secure free opportunity. The rules whereby . . . this free opportunity is secured are the law." 1 SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, § 52.

[70] JUSTICE, Appendix A.

[71] *Cf.* CHARMONT, LA RENAISSANCE DU DROIT NATUREL, 122. As to Spencer's relation to Kant, see 1 MAITLAND, COLLECTED PAPERS, 279–80.

[72] "We are to search out with a genuine humility the rules ordained for us — are to do unfalteringly, without speculating as to consequences, whatsoever these require." SPENCER, SOCIAL STATICS, Conclusion, § 8. "If society be, as I assume it to be, an organism operating on mechanical principles, we may perhaps, by pondering upon history, learn enough of those principles to enable us to view, more intelligently than we otherwise should, the social phenomena about us." ADAMS, THEORY OF SOCIAL REVOLUTIONS, 203. See the comments of DEL VECCHIO, FORMAL BASES OF LAW (transl. by Lisle), § 70.

[73] PROUDHON, QU'EST-CE QUE LA PROPRIÉTÉ? (1840); PROUDHON, IDÉE GÉNÉRALE DE LA RÉVOLUTION AU DIX-NEUVIÈME SIÈCLE (1851); PROUDHON, DE LA JUSTICE DANS LA RÉVOLUTION ET DANS L'ÉGLISE (1858); STIRNER, DER EINZIGE UND SEIN EIGEN-

a régime of individual action by voluntary coöperation, free from coercion by state-enforced rules.[74] As this group argued for a free consensual rather than a legal ordering of society, naturally enough it gave us nothing which is of importance for jurisprudence. On the other hand the idea of law and government as means of achieving individual liberty was taken up by another group,[75] which, rejecting political and juristic pessimism but holding to the idea of individual self-assertion as the end, developed what may fairly be called a social individualism.[76] Where the main current of nineteenth-century juristic thought, following the seventeenth and eighteenth-century tradition, opposed society and the individual and was troubled to reconcile government and liberty, this group sought individual liberty through collective action and called for the maximum of governmental control as the means to a maximum of liberty.[77] On another side in contributing to theories of the social

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THUM (1845); GRAVE, LA SOCIÉTÉ FUTURE, 7 ed., 1895. See BASCH, L'INDIVIDUALISME ANARCHISTE: MAX STIRNER (1904); 2 BEROLZHEIMER, SYSTEM DER RECHTS- UND WIRTHSCHAFTSPHILOSOPHIE, § 39; BROWN, THE UNDERLYING PRINCIPLES OF MODERN LEGISLATION, Prologue (The Challenge of Anarchy).

[74] "Free association, liberty, which is confined to the maintaining of equality in the means of production and of equivalence in exchanges, is the only possible just and true form of society. Politics is the science of liberty; under whatever name it may be disguised, the government of man by man is oppression. The highest form of society is found in the union of order and anarchy." PROUDHON, QU'EST-CE QUE LA PROPRIÉTÉ?, 1 OEUVRES COMPLÈTES (1873 ed.), 224. So Stirner argues that the "liberty" of the metaphysical school is but a negative idea; put positively, the end is: "Be your own; live for yourself, according to your individuality." Accordingly the only justification for society is to contribute to the development of the individual and "permit a larger extension of his powers without demanding restrictions upon his personality beyond what already exist as natural conditions of life in the environment in which he is found." GRAVE, LA SOCIÉTÉ FUTURE, 157.

[75] Here we are concerned with the socialists only in their relation to nineteenth-century juristic thought as to the end of law. Reference may be made to 2 BEROLZHEIMER, SYSTEM DER RECHTS- UND WIRTHSCHAFTSPHILOSOPHIE, § 38.

[76] "Socialism in all its forms leaves intact the individualistic ends, but resorts to collective action as a new method of attaining them. That socialism is through and through individualistic in tendency, with emotional fraternalism superadded, is the point I would especially emphasize." Adler, "The Conception of Social Welfare," PROCEEDINGS OF THE CONFERENCE ON LEGAL AND SOCIAL PHILOSOPHY, 1913, 9.

[77] "It is the function of the state to further the development of the human race to a state of freedom. . . . It is the education and evolution of the human race to a state of freedom." LASSALLE, ARBEITERPROGRAM (1863), 1 WERKE (ed. by Blum), 156, 200. "I take it that the régime of a socialist administration will involve an enormous change of attitude in dealing with crime. Firstly, it will without doubt reduce to the minimum the number of actions characterized by the law as crimes. Secondly, it

interest in the individual life and in developing the Hegelian idea of a culture-state as distinguished from the Kantian law-state, the nineteenth-century socialists mark the beginnings of a transition to a new conception of the end of law. But this aspect must be considered in another connection.

In the nineteenth century, the idea of justice as the maximum of individual self-assertion, which begins to appear at the end of the sixteenth century, reached its highest development. But at the same time the actual course of legal rules and doctrines began to turn toward a new idea of the end of law and the forerunners of that idea appeared in juristic thought.

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will certainly regard the greatest possible consideration for the criminal compatible with the maintenance of social existence at all, as its first duty in the matter." BAX, THE ETHICS OF SOCIALISM, 3 ed., 57 (1893). It should be noted that the first prophecy is not borne out by modern social legislation.